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June 14, 2010

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-325
445 12th Street, S.W.
Washington D.C. 20554

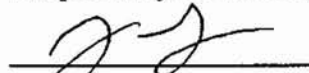
Re: **In the Matter of Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25**

Dear Ms. Dortch:

On behalf of tw telecom, inc. please find enclosed two copies of a redacted version of an ex parte letter filed today in the above referenced docket. Pursuant to the protective order in this proceeding¹, two copies of the confidential version of the ex parte letter have been filed with Margaret Dailey and a copy of the confidential version of the ex parte letter has also been filed with the Secretary. An electronic copy of the redacted version of the ex parte letter has also been filed with the Secretary's Office via ECFS.

Please let us know if you have any questions with respect to this submission.

Respectfully submitted,


Thomas Jones
Jonathan Lechter

Attorneys for tw telecom inc.

¹ *Special Access Rates for Price Cap Local Exchange Carriers, Order, 20 FCC Rcd 10160 (2005).*

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VIA ECFS & HAND DELIVERY

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-325
445 12th Street, S.W.
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Re: In the Matter of Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25

Dear Ms. Dortch:

tw telecom inc. ("TWTC") submits this letter in support of the recent filings by PAETEC and XO ("PAETEC/XO")¹ and CompTel² urging the FCC to (1) immediately equalize Phase II and price cap rates and (2) decline to approve any further petitions for Phase II pricing flexibility.

I. The FCC Must Act Immediately To Equalize Phase II and Price Cap Rates

As the PAETEC/XO and CompTel filings make clear, the FCC can and should act now to reign in the incumbent LECs' unreasonable Phase II rates given the hundreds of millions of dollars in excess charges imposed by the incumbent LECs in Phase II areas. Contrary to assertions made by Verizon in its recent ex parte letter,³ the FCC need not collect additional data or further examine actual or potential competition before reducing prices in Phase II areas to price cap levels.⁴ The evidence

¹ See Letter of Joshua Bobeck, Counsel, PAETEC, and Thomas Cohen, Counsel, XO, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25 (filed May 28, 2010) ("*PAETEC/XO Letter*").

² Letter of Karen Reidy, Vice President, Regulatory Affairs, CompTel, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25 (filed June 1, 2010) ("*CompTel Letter*").

³ Letter of Donna Epps, Vice President, Federal Regulatory Advocacy, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25 at 1-2 (filed June 7, 2010) ("*Verizon June 7 Letter*").

⁴ As explained below, is it likely that additional data must be collected for the FCC to design and implement an analytical framework to evaluate competition in the special access market going forward to replace the flawed pricing flexibility triggers.

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already in the record shows that the pricing flexibility triggers are incoherent on their face and that, in practice, the pricing flexibility regime has allowed incumbent LECs to sustain supracompetitive prices for DS1 and DS3 special access services in Phase II areas across the country.

In order to reduce DS1 and DS3 special access prices in Phase II areas to the level of prices charged for these services in areas subject to price caps, the FCC need not actually apply price caps to special access rates charged in Phase II areas. Rather, the FCC can simply direct the incumbent LECs subject to price cap regulation outside of Phase II areas to "offer" DS1 and DS3 special access services in Phase II areas at rates that are "no higher than, and on the same terms and conditions" as rates for the same services in price cap areas. This is exactly the way in which the AT&T and BellSouth fashioned voluntary condition 6 in the BellSouth/AT&T merger.⁵ To implement such a requirement as an agency rule, the incumbent LECs, as AT&T/BellSouth did in compliance with their merger commitments, would be required to file new tariffs in which current price cap prices are substituted for prices currently charged in areas subject to Phase II pricing flexibility.⁶ No changes to the price cap rules and no other changes to incumbent LEC tariffs would be necessary. Moreover, such an approach will not affect incumbent LECs in those few cases where DS1 and DS3 special access rates in Phase II areas are not higher than the prices charged for the same services in areas subject to price caps.

⁵ *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Order on Reconsideration 22 FCC Rcd. 6285, at Appendix (2007) ("In areas within the AT&T/BellSouth in-region territory where an AT&T/BellSouth incumbent LEC has obtained Phase II pricing flexibility for price cap services ('Phase II areas'), such incumbent LEC will offer DS1 and DS3 channel termination services [and] DS1 and DS3 mileage services... that currently are offered pursuant to the Phase II Pricing Flexibility Provisions of its special access tariffs, at rates that are no higher than, and on the same terms and conditions as, its tariffed rates, terms, and conditions as of the Merger Closing Date for such services in areas within its in-region territory where it has not obtained Phase II pricing flexibility....The AT&T/BellSouth incumbent LECs will file all tariff revisions necessary to effectuate this commitment within 90 days from the Merger Closing Date.").

⁶ See *Ameritech Services*, Tariff FCC No. 2, Description and Justification, Transmittal No. 1617, at 1 (filed May 18, 2007) ("Ameritech proposes language to clarify that temporarily reduced rates for DS1 and DS3 local distribution and/or channel mileage services, filed on Transmittal No. 1605, apply solely to interstate services, and that these reduced rates expire on June 30, 2010. In addition, new rate pages are being introduced for DS1 and DS3 local distribution channel and mileage services that reflect rates that were in effect on April 4, 2007 and that will be effective again on July 1, 2010; Ameritech Services, Tariff FCC No. 2, Letter of Patrick Doherty, Director, Access Regulatory Affairs, AT&T, to Marlene H. Dortch, Secretary, FCC, Transmittal No. 1605 (filed Mar. 29, 2007) ("With this filing, Ameritech is proposing to introduce rate reductions in areas where the F.C.C. has granted Phase II pricing flexibility for price cap services, which is being filed in compliance with Special Access Merger Commitment #6 of the AT&T/BellSouth Merger....This provision is temporary and will remain in effect until June 30, 2010.").

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To be sure, equalizing prices in Phase II and price cap areas is only the first step to reforming the special access regime. Most importantly, the long-term solution must ensure that all incumbent special access services, TDM and Ethernet, are offered at just and reasonable rates. The same factors that facilitate the exercise of incumbent LEC market power over TDM-based DS1s and DS3s (e.g., high incumbent LEC facilities market share and high barriers to facilities construction) also permit the incumbent LECs to exercise market power over Ethernet services. [confidential begin] [confidential end]⁷ because the incumbent LECs, freed from price regulation, set Ethernet rates at supracompetitive levels. As a result, [confidential begin] [confidential end]. It follows that, as part of its long-term solution for Ethernet, the FCC must reverse the grants of forbearance permitting Verizon, AT&T, Qwest, Embarq and Frontier to escape completely from price regulation for Ethernet and other packet-switched special access services.

II. The Evidence Already In The Record Fully Justifies Equalizing Phase II and Price Cap Rates

A. The Pricing Flexibility Triggers Are Broken

As PAETEC/XO, TWTC and numerous other parties to this proceeding have observed, the pricing flexibility triggers do not target pricing flexibility to areas subject to facilities-based competition.⁸ Indeed, the FCC acknowledged in the *Pricing Flexibility Order* that its triggers might be poor predictors of competitive deployment, particularly for channel terminations.⁹ The FCC was correct: as the GAO found, “there are more competitor lit buildings in MSAs that remain under price caps than those in which Phase II pricing flexibility has been granted.”¹⁰ The FCC cannot continue to depend on a proxy test for competition that is so wildly inaccurate.

B. The Incumbent LECs Retain Market Power Over DS1s and DS3s

As PAETEC/XO show, the incumbent LECs possess market power over DS1 and DS3 services. The data in the record demonstrates that incumbent LECs have sustained over time an extremely high share of the market for both “the physical connections to customer locations and DS1

⁷ Nor, as TWTC has explained, can it rely on TDM-based special access or copper facilities to provide Ethernet service in the vast majority of cases. See *infra* note 70.

⁸ See, e.g., *PAETEC/XO Letter* at 4 (citing numerous CLEC, incumbent LEC and third party filings discussing the flaws in the pricing flexibility triggers).

⁹ *Access Charge Reform et al.*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221, ¶ 103 (1999) (“*Pricing Flexibility Order*”), *subsequent history omitted* (noting that the collocations “do[] not provide direct evidence of sunk investment by competitors in channel terminations between the end office and customer premises.”).

¹⁰ *PAETEC/XO Letter* at 4.

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and DS3 services provided via such facilities.”¹¹ Moreover, as the FCC has recently reiterated, fiber deployment is expensive, time consuming and difficult.¹² At the same time, the incumbent LECs’

¹¹ See, e.g., *id.* at 4-5 & n.13 (citing record evidence); see also PAETEC *et al.* Comments, WC Dkt. No. 05-25, at n.144 (filed Jan. 19, 2010) (citing Letter of Regina Keeney, Counsel, XO, to Marlene H. Dortch, Secretary, FCC, GN Dkt. Nos. 09-51 *et al.*, RM-11358, at Slide 6 (filed Oct. 26, 2009) (noting that XO recently stated that it must rely on ILEC facilities for 96% of its last-mile access requirements.)); Letter from Thomas Jones, Counsel, TWTC, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 14-15 (filed July 9, 2009) (“*TWTC July 9, 2009 Letter*”) (citing various CLECs’ comments and ex parte letters stating that less than 1% of NuVox’s loop access needs are met through competitive providers; that T-Mobile obtains 92% of its special access loops from the ILEC; and that, in 2006, Sprint purchased 98% of its DS1s in the top 50 MSAs and 84% of its DS3s from ILECs); Letter from Paul B. Jones, tw telecom inc., to Tom Wheeler, Obama-Biden Transition Project at 4 (filed Dec. 22, 2008) (noting that ILECs “have increased what had already been a massive market share position in provision of special access. In 2001, their share of the wholesale special access market was 92.7 percent,” and their share increased to 94.1% in 2005); *id.* (noting that, in 2007, Sprint reported that “AT&T and Verizon combined held 81 percent of [ILECs]’ special access revenues nationwide”); *Ex Parte* Letter from Anna M. Gomez, Sprint Nextel, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, Attach. at 2, Slides 6-7 (filed Aug. 22, 2007) (noting that Sprint’s reliance on incumbent LEC DS1s has grown from 88 percent in 2001 to 96 percent in 2006, and its reliance on DS3s has grown from 73 percent in 2001 to 84 percent in 2006); ATX *et al.* Comments, Attach. A: Declaration of Don Eben, WC Dkt. No. 05-25, ¶ 5 (filed Aug. 8, 2007) (“*ATX et al. 2007 Comments*”) (“McLeod USA is able to obtain DS1 and DS3 level access to no more than 5% of customer locations.”); ATX *et al. 2007 Comments*, Declaration of Steven H. Brownworth ¶ 4 (“Deltacom is able to obtain DS1 and DS3 level access from competitors to no more than 10% of customer locations.”); Covad *et al.* Comments, Declaration of Michael Clancy on Behalf of Covad, WC Dkt. No. 05-25, ¶ 7, (filed Aug. 8, 2007) (“*Covad et al. 2007 Comments*”) (“As of July 27, 2007, less than [confidential begin] [confidential end] of Covad’s loop access needs are met by using competitive alternatives or ILEC special access.”); GAO, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80, at 12 (Nov. 2006) (“Our analysis of data on the presence of competitors in commercial buildings suggests that competitors are serving, on average, less than 6 percent of the buildings with at least a DS-1 level of demand. Competition is more widespread where buildings have a higher level of demand. For the subset of buildings identified as likely having companies with a DS-3 level of demand, competitors have a fiber-based presence in about 15 percent of buildings on average.”); Reply Comments of Wiltel, WC Dkt. No. 05-25, at 9 & n.26 (filed July 29, 2005) (noting that Ad Hoc Telecommunications Users Committee has stated that ILECs “remain the sole source of connectivity at roughly 98% of all business premises.”); see also AT&T Reply Comments, RM-10593, at 13 (filed Jan. 23, 2003).

¹² PAETEC/XO Letter at 6 (“As the FCC recently reiterated, the costs of fiber deployment ‘range from approximately \$11,000 to \$24,000 per mile for aerial construction and roughly \$25,000 to \$165,000 per mile for buried construction.”); *id.* at n.18; Covad *et al. 2007 Comments*, Declaration of Ajay Govil on Behalf of XO, ¶ 16 (“The average XO building lateral is 500 feet long and on average costs [confidential begin] [confidential end] in outside plant construction and building access plus

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special access output has been increasing.¹³ Limited competitive entry along with escalating incumbent LEC output makes it unlikely that the incumbent LECs' DS1 and DS3 market share will decline in the foreseeable future.

High, stable market share over time coupled with persistently high barriers to entry is indicative of market power. Indeed, if AT&T believed that current or future competition would have any constraining effect on its unilateral pricing power in Phase II areas, it would not have planned to increase its Phase II rates to pre-merger levels *over three years in advance* at the time that it filed its tariffs to comply with its merger commitments.¹⁴ Nor is there any indication that AT&T will hesitate to follow through with its planned unilateral price increase. On June 1, AT&T sent letters to carriers again reiterating that their Phase II rates will increase to pre-merger levels by July 1.¹⁵

C. The Incumbent LECs Are Exercising Their Market Power In Phase II Areas By Imposing Supracompetitive Rates and Unreasonable Terms and Conditions In Their Volume/Term Agreements

1. Incumbent LEC Phase II Rates Are Higher Than Their Price Cap Rates

The fact that incumbent LECs' Phase II rates are nearly universally higher than price cap rates demonstrates that they possess and *are exercising* market power in Phase II areas. Indeed, all of the available evidence, including the GAO's exhaustive study and data recently submitted by CompTel shows conclusively that Phase II rates are higher than price cap rates in nearly every instance. This persistent gap between Phase II and price cap rates has been in effect *since the inception of the pricing flexibility regime* and is true for *nearly every element under nearly every rate plan* (i.e., month-to-

[confidential begin] [confidential end] for the associated electronics, totaling [confidential begin] [confidential end] per building assuming no significant space conditioning or internal end user wiring problems.”).

¹³ See Verizon & Verizon Wireless Comments, WC Dkt. No. 05-25, at 8-9 (filed Jan. 19, 2010) (“Verizon Comments”) (“The Commission’s own data for large ILECs showed that between 2003 and 2006, special access lines increased by approximately 26.3 percent per year when calculated on a voice-grade equivalent basis. Likewise, between 2006 and 2007...special access lines grew again by 23.1 percent.”); Declaration of Alfred E. Kahn & William E. Taylor on Behalf of BellSouth, Qwest, SBC, and Verizon, RM-10593, at 12 (dated Nov. 27, 2002), attached to Opposition of SBC, RM-10593 (filed Dec. 2, 2002) (“These data clearly show a rapid and accelerating growth of RBOC special access lines, averaging 30 percent per year over the 1996-2001 period.”).

¹⁴ See *supra* note 6.

¹⁵ See Accessible Letters from Legacy SBC and Legacy BellSouth Operating Companies (attached hereto as Appendix A).

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month, term, generally available volume/term discount plan and volume/term contract).¹⁶ Moreover, [confidential begin]¹⁷ [confidential end]. The existence of a persistent rate differential between

¹⁶ See *PAETEC/XO Letter* at nn.25-28 (citing record evidence); *CompTel Letter* at Attachment A; *PAETEC et al. Comments*, WC Dkt. No. 05-25, at 3-5 (filed Jan. 19, 2010) (PAETEC found that, after examining month-to-month, one year and two year term rates, Verizon's current special access DS1 loop rates are "approximately 15-30% higher" in Phase II areas than under price caps. Qwest's rates are "approximately 26-47% higher" in Phase II areas than under price caps.); Pricing Charts attached to Letter of Paul Margie, Counsel, Sprint Nextel, Thomas Jones, Counsel, tw telecom and Colleen Boothby, Counsel, Ad Hoc Telecommunications Users' Committee, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25 (filed Oct. 23, 2009) (charts comparing AT&T and Verizon price cap and Phase II rates in all pricing zones for month-to-month, one-year, three-year and five-year terms show that Phase II rates are higher than price cap rates in nearly every instance); *ATX et al. 2007 Comments* at 5, Table 1 (noting that Qwest's special access DS1 rates have increased dramatically since it obtained Phase II special access pricing flexibility in the Omaha MSA. For month-to-month rates, the price in Phase II areas was 45.83% higher than the price cap rate; for 1-year term rates, 42.61% higher; for 2-year term rates, 31.58% higher); *id.* at 6 (noting that Qwest's DS1 channel termination rates are 22 to 47% higher in Phase II areas than in price cap areas, while BellSouth's DS1 mileage rates are 13 to 71% higher in Phase II areas than in price cap areas); *TWTC et al. Comments*, WC Dkt. No. 05-25, at 23 (filed Aug. 8, 2007) (noting that, as a result of Qwest's 2004 price increases in Phase II areas, TWTC's prices for special access in Qwest's region increased by about 19%. TWTC faced rate increases of nearly 25% for DS1 channel terminations in "the most competitive" zone 1 and for rates for 0-8 mile mileage DS1 transport.); *Global Crossing Comments*, WC Dkt. No. 05-25, Declaration of Janet Fischer ¶ 5 (filed Aug. 8, 2007) ("[F]rom July 1997 to July 2007..., rates in [Phase II] areas either trended higher than price cap rates, or remained flat while price cap rates trended lower."); *Ad Hoc Comments*, WC Dkt. No. 05-25, at 12-14, Tables 1 & 2 (filed Aug. 8, 2007) (a comparison of ILEC DS1 prices (month-to-month for a 10-mile circuit) in 20 states, showed that Phase II rates exceeded price cap rates by 21 to 47%. In a comparison of the same states for DS3 prices (5-year term for a 10-mile circuit), Phase II rates also exceeded price cap levels by 21-47%.); *Comptel et al. Comments*, WC Dkt. No. 05-25, at 8 (filed June 13, 2005) (noting that, from July 1997 to June 2005, BellSouth price cap rates trended down for both channel terminations and mileage. "Once pricing flexibility was granted, the downward trend stopped for deregulated rates. While price capped rates continued to decline, [Phase II] rates either remained flat...or increased. Similar trends appear for each of the RBOCs."); *XO et al. Comments*, WC Dkt. No. 05-25, at 6 (filed June 13, 2005) (noting that, in a detailed study, the Phoenix Center found that, on average, over a period of four years, Phase II rates were significantly higher than price cap rates and "while the amount of the increase varies substantially among ILECs, deregulated rates...exceed the regulated (price cap) rates for all ILECs."); *id.* (finding that, for example, DS1 Phase II rates for BellSouth were on average 3% higher than price cap rates; 10% higher for SBC; 14% higher for Verizon, and 20% higher for Qwest. For DS3s, the Phase II rates were 12% higher for BellSouth; 10% higher for SBC; and 10% higher for Verizon); *AT&T Petition for Rulemaking*, RM-10593, at 11-12 (filed Oct. 15, 2002) (finding that, as of 2002, about 59% of the Bells' special access revenues were no longer subject to price cap regulation); *id.* (noting that BellSouth and Verizon both "increased special access rates in every MSA in which they [were] awarded Phase II pricing flexibility....Verizon increased its month-to-month DS1 rates as much as

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Phase II and price cap areas demonstrates that incumbent Phase II rates have long been and continue to be set at supracompetitive levels.

The incumbent LECs' only response to the evidence that Phase II rates exceed price cap rates is to argue that the FCC anticipated that Phase II rates would rise above price cap levels in locations where price caps had caused rates to be set below incumbents' costs and competitive levels.¹⁸ But as XO/PAETEC remind the Commission, the FCC only believed that Phase II rates might increase for "some customers" and that "some access rate increases may be warranted, because [price cap regulation] may have required incumbent LECs to price access services below cost in *certain areas*."¹⁹ In reality, the record evidence shows that Phase II rates increased and have been maintained above price cap rates in *nearly every case*.

Moreover, as XO and PAETEC point out, if the incumbent LECs truly believed that price caps pushed their prices below competitive levels or below their costs, they would not have agreed to eliminate the accounting rules which served as the most effective mechanism for demonstrating below cost prices.²⁰ Most importantly, given the billions of dollars a year the incumbent LECs earn from special access services, if they believed that they were materially under-earning under price caps, they "should have logically made it their highest priority to marshal and file the best available evidence demonstrating the scope of their under-earning."²¹ The incumbents' failure to do so demonstrates that their assertion that price cap rates are set below competitive levels or their costs should not be taken seriously.

15% (and...DS3 rates by 6%) in *every* MSA in which it won Phase II pricing flexibility, even in large cities such as New York and Boston where presence of competitors is greatest....BellSouth raised its month-to-month DS3 rates by almost 9% and its DS1 rates by 8%, in each MSA in which it received pricing flexibility, including such large cities like Atlanta and Miami.") (emphasis in original).

¹⁷ [confidential begin] [confidential end].

¹⁸ Reply Comments of Verizon & Verizon Wireless, WC Dkt. No. 05-25, at 6 (filed Mar. 19, 2010) ("Verizon Reply Comments") ("[T]he Commission acknowledged that, once pricing flexibility was implemented, special access prices would not necessarily decline in all cases, but would instead move both up and down, pushing toward some equilibrium price, consistent with what occurs in a competitive market. The Commission noted, for example, that, in some cases, special access prices might rise because our rules may have required incumbent LECs to price access services below cost.") (internal citations omitted).

¹⁹ See PAETEC/XO Letter at 12 (citing *Pricing Flexibility Order* ¶ 155 (emphasis added)).

²⁰ See *id.* at 13.

²¹ *Id.*

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2. Incumbent LEC Volume/Term Agreements Represent The Exercise Of Market Power

The incumbent LECs argue that, when volume/term special access discounts (both generally available volume/term discounts and contract tariffs) are taken into account, their Phase II rates are reasonable and few if any customers pay undiscounted rates.²² The incumbent LECs therefore assert that their relatively lower discounted prices demonstrate that they are not exercising market power.

But the volume/term discounts do not represent a bargain for competitors. As the FCC has repeatedly found, incumbent LECs can exercise their market power through either price or non-price terms.²³ To receive discounts in Phase II areas, competitors must “pay” in the form of unreasonable terms and conditions. Therefore, the non-price terms in such plans represent just as much an exercise of market power as do higher, undiscounted, Phase II prices. For example, a competitor’s commitment to maintain 95 percent of its DS1 and DS3 spending with an incumbent LEC over a four year period in exchange for a lower Phase II rate may provide the exact same overall value to the incumbent as higher Phase II rates in the absence of such a commitment. Indeed, the incumbent LECs would likely not offer such a “bargain” if that were not the case.

As XO/PAETEC and TWTC have explained, these contracts are also anticompetitive for the additional reason that they act as above-cost tying arrangements, tying access to the majority of locations over which the incumbent has a monopoly, to those limited number of locations where there is competitive supply.²⁴ As XO/PAETEC argue, “even though non-incumbent LEC wholesalers offer on-net service in certain locations at prices below those charged by the incumbent, the buyer would be

²² See, e.g., Verizon Comments, Attach. A: Declaration of Michael D. Topper, ¶ 72 (“A large fraction of ILEC DS-1 and DS-3 services are sold under term and volume discount plans and price flexibility contracts that provide substantial discounts from list prices. Analysis of price trends should incorporate the effect of these discounts.”).

²³ See, e.g., *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements et al.*, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd. 16440, ¶ 70 (2007) (“AT&T’s, Qwest’s, and Verizon’s exclusionary market power [over local exchange services] raises the possibility that they could leverage market power in the telephone exchange service or exchange access markets to impede competition in the in-region, interstate, long distance services market, through discrimination against competitors, improper cost shifting, or price squeezes. See, e.g., *LEC Classification Order*, 12 FCC Rcd at 15815-19, paras. 103-08, 15821-26, paras. 111-19, 15829-33, paras. 125-30, & 15847-15857, paras. 158-75 (describing the incentives, ability, and means for an incumbent LEC to improperly allocate costs, engage in price and non-price discrimination, and engage in a price squeeze).”).

²⁴ See *PAETEC/XO Letter* at 22; *TWTC July 9, 2009 Letter* at 22-24.

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worse off choosing the competitive wholesaler in many instances" because of forgone incumbent LEC and penalties incurred.²⁵

Indeed, there is every reason to believe that incumbent LEC volume/term tying conditions are becoming even *more* onerous, indicating, if anything, an *increase* in the incumbent LECs' market power over time. For example, Qwest recently changed the terms of its Regional Commitment Plan ("RCP") so that, as of June 1, competitors signing-up for the revised RCP plan must maintain 95 percent of their current DS1 and DS3 spend with Qwest (up from 90 percent under the old RCP plan) in order to receive the same 22 percent discount.²⁶

Qwest's high commitment levels substantially limit the ability of competitors either to deploy on-net facilities or to use competitor-provided facilities, particularly if their demand for DS1 or DS3 special access is static or declining. Qwest's commitments also undermine competitors' rollout of new and innovative technologies. For example, TWTC's customers increasingly demand Ethernet services. When TWTC must rely on off-net loop facilities to provide Ethernet, it is far more efficient to do so via Ethernet loops than via DS1 or DS3 loops. But in order to meet the high DS1 and DS3 commitment levels demanded by Qwest, TWTC may have no choice but to rely on DS1 and DS3 circuits instead of more efficient Ethernet circuits when providing Ethernet services to off-net locations. This is just another example of the inefficiencies created by incumbent LEC volume/term special access "discount" offers.

Nor has Qwest made any changes to its RCP that compensate purchasers for the increased commitment levels. For example, under both the old and revised RCP plans, the customer must maintain the commitment over a 48-month term or face a punitive penalty equal to the cost of the

²⁵ *PAETEC/XO Letter* at 20.

²⁶ See Qwest Tariff Transmittal No. 419, Tariff FCC No. 1 (May 17, 2010) ("Qwest May 17, 2010 Tariff Transmittal") ("Qwest is filing tariff language in Section 7, Private Line Transport Service, to grandfather its existing unit based Regional Commitment Program (RCP) and replace it with a new revenue based RCP. The new RCP will have a 95% commitment level....RCP customers will not be impacted until their current RCP agreement expires."); Qwest Tariff FCC No. 1, T-419, § 7.1.3(B)(1) (May 17, 2010) ("A RCP is an optional pricing plan that allows DS1 and/or DS3 customers to receive 22% price reductions for committing to a minimum monthly recurring revenue on DS1 and/or DS3 circuits provided to customer under Sections 7 and 17 of this Tariff for a 48 month term....For DS1 service, a customer must commit to a minimum of 95% of the monthly recurring revenue[.] For DS3 service, a customer must also commit to a minimum of 95% of the monthly recurring revenue[.]"); *id.* § 7.99.13(A)(1) ("A RCP is an optional pricing plan that allows DS1 and/or DS3 customers to received 22% price reductions for committing to a minimum quantity of DS1 and/or DS3 circuits provided to customer under Sections 7 and 17 of this Tariff for a 48 month term....For DS1 service, a customer must commit to a minimum of 90% of their total Company-provided in-service DS1 Service circuits...For DS3 service, a customer must also commit to a minimum of 90% of their total Company-provided in-service DS3 Service circuits.").

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additional circuits necessary to meet the commitment.²⁷ As Verizon explains, this is a common penalty under incumbent LEC volume/term plans.²⁸ Moreover, under both the old and revised RCP plans, the volume commitment “ratchets” up, on a monthly or annual basis, capturing any increased spending with Qwest.²⁹ If the customer asks to decrease the commitment level under either the old or revised plan, it will face termination liability.³⁰ Accordingly, in order to obtain the same discount under the revised plan, competitors must now agree to a higher commitment level in addition to accepting the same onerous terms and conditions applicable under the old plan. Given the increased burden of Qwest’s revised plan, there can be no other conclusion than that Qwest is now leveraging its market power even more aggressively than in the past.

Many competitors have no choice but to buckle under to Qwest’s terms. Indeed, [confidential begin] [confidential end].

Notwithstanding any anticompetitive terms or conditions in such volume/term discount plans, the rates offered under such plans are still set at unreasonable levels. As TWTC has shown, the prices that it *actually pays* in Phase II areas under substantial volume/term discounts exceed competitors’ rates and the incumbents’ forward-looking costs in nearly every case.³¹ Additionally, as PAETEC/XO

²⁷ Qwest Tariff FCC No. 1, T-419, § 7.1.3(B)(3)(c) (May 17, 2010) (“For each month the eligible monthly recurring revenue falls below the commitment level, the customer will be charged a shortfall on their next month’s billing. The shortfall will be the difference between the commitment amount and the actual monthly recurring revenue.”); *id.* § 7.99.13(A)(3)(c) (“For each month the in-service circuits fall below the commitment level, the customer will be charged a shortfall on their next month’s billing.”).

²⁸ Verizon Reply Comments, Attach. B: Declaration of Quentin Lew & Anthony Recine ¶ 5 (“*Lew/Recine Decl.*”) (“[F]or those plans with minimum volume commitments, customers that fall short of the volume commitment typically only pay the difference between what they paid for the special access services they actually purchased, and what they would have paid if they satisfied the required commitment level.”).

²⁹ Qwest Tariff FCC No. 1, T-419, § 7.1.3(B)(4) (May 17, 2010) (“If customer selects the monthly option, the Company will automatically increase the monthly recurring revenue commitment level each month that the monthly recurring revenue for in service circuits increases....If customer selects the annual option..., [a]t the time of the annual review, the commitment level will be changed by the company to reflect 95% of the current monthly recurring revenue for in-service DS1/DS3 circuits...”); *id.* § 7.99.13(A)(4)(a) (same except “circuits” substituted for “revenues” and “90% for “95%”).

³⁰ *Id.* § 7.1.3.(B)(5)(a) (“A decrease in the commitment level before the expiration date will also result in the application of the Termination Liability.”); *id.* § 7.99.13(A)(5)(a) (same).

³¹ *TDM Price Charts*, attached to Letter of Thomas Jones, Counsel, TWTC, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25 (filed Oct. 11, 2007) (comparing RBOC Phase II and price cap

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explained, many carriers do not opt into volume/term discounts because their terms are so onerous.³² Such carriers do not benefit from allegedly reasonable discounted prices.

3. Incumbent LECs' Phase II Rates Substantially Exceed Their Costs And Competitors' Rates

As XO/PAETEC and TWTC have repeatedly argued, the incumbent LECs' costs and profit margins are the best way to measure whether the incumbent LECs are earning supracompetitive profits.³³ But the incumbent LECs have steadfastly refused to supply information regarding their costs or profit margins. They have argued that ARMIS cost data do not accurately measure their costs and, in fact, they have argued that their costs are ultimately unknowable.³⁴ But, as PAETEC/XO have explained, two measures of their costs and the reasonableness of their rates are in fact available: UNE and competitor rates.

As both PAETEC/XO and CompTel show, the incumbent LECs' Phase II special access rates substantially exceed both UNE and competitor rates in almost every case.³⁵ This is true regardless of the incumbent special access pricing plan analyzed. Indeed, CompTel demonstrates that Phase II rates are, in most cases, more than 200 percent higher than UNE rates and are, in one state, 900 percent higher.³⁶ Because incumbent LEC rates in Phase II areas remain well above UNE rates, it must be the case that competition is not sufficient to discipline incumbent LEC prices in the absence of appropriately designed price cap regulation.

The incumbent LECs argue that competitors' rates and the incumbent LECs' forward looking costs are not accurate measures of just and reasonable rates. But as PAETEC/XO show, the

rates under substantial volume/term discounts to UNE rates and competitors' one-year, no-volume commitment prices).

³² See *PAETEC/XO Letter* at 11.

³³ See *TWTC July 9, 2009 Letter*, Attach. A: Declaration of Stanley M. Besen.

³⁴ See, e.g., Verizon Comments at 43 ("Even if the costs or profits of special access services were relevant to assessing competition for high capacity services, it would not be practical or feasible for the Commission to measure or calculate them.").

³⁵ See *PAETEC/XO Letter* at 14-16; *CompTel Letter*, Attachments A & B.

³⁶ In Attachment B of its letter, CompTel compared month-to-month price cap channel termination rates to UNE rates, and showed that month-to-month price cap rates are higher than and, in most cases, over 200 percent higher than UNE rates. In attachment A, CompTel showed that Phase II rates were higher than price cap rates in nearly every instance on month-to-month, two-year, three-year and five-year terms. Therefore, month-to-month Phase II rates are well over 200 percent higher than UNE rates in nearly every state CompTel examined. See *CompTel Letter*, Attachments A & B.

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incumbents are incorrect. *First*, competitors' costs are likely higher than incumbents costs, demonstrating that incumbents' higher prices translate into supracompetitive profits. In particular, competitors' costs of providing DS1s and DS3 special access services in high-density, low cost areas are likely much higher than the costs incumbent LECs incur to offer these services.³⁷ Indeed, as the FCC found in its recent *Broadband Cost Study*, copper-based transmission services have extremely low incremental deployment costs, while competitors must spend tens of thousands of dollars to extend last mile facilities to new locations in order to provide DS1 and DS3 services.³⁸

In any event, as PAETEC has argued, if the DS1 and DS3 market were truly competitive, incumbent LECs' and competitors' prices would converge, *regardless of their costs*.³⁹ In a competitive market for undifferentiated products⁴⁰ such as DS1s and DS3 special access services, firms that set prices above the competitive level would be driven from the market in the same way that high cost steel makers have been driven from the steel market.⁴¹ Therefore, the persistent differential

³⁷ See *PAETEC/XO Letter* at 16-18. The special access zone system ensures that the incumbents' higher costs in outlying areas do not affect their rates in denser areas where they face competition. See *Pricing Flexibility Order* ¶¶ 61, 64 ("As the Commission observed in the *Access Reform NPRM*, averaging across large geographic areas distorts the operation of markets in high-cost areas because it requires incumbent LECs to offer services in those areas at prices substantially lower than their costs of providing those services....[C]hanges in incumbent LEC pricing zones resulting from this Order are likely to *increase* the degree to which trunking service prices reflect cost and thus would decrease the likelihood of cross-subsidization.") (emphasis in original).

³⁸ See *PAETEC/XO Letter* at 17-18; *id.* at n.57.

³⁹ See *PAETEC et al. Reply Comments*, WC Dkt. No. 05-25, at 60 (filed Feb. 24, 2010) ("PAETEC *et al.* Reply Comments") ("Moreover, as a matter of basic economics, in a competitive marketplace, competing prices for similar services offered by the various providers will be similar regardless of their cost differences. In a truly competitive market, a higher cost producer cannot charge more than competitive prices even though its costs are higher because if it charged more, the higher cost producer would no longer be competitive.").

⁴⁰ DS1 and DS3 special access services are essentially commodities; services that are provided according to decades-old standards at specified bandwidths. See Newton's *Telecom Dictionary*, DS-1, at 324 (22nd ed. 2006) ("T-1 is the original standard, having been developed by Bell Telephone Laboratories in the 1950's.").

⁴¹ See Y. Datta, *A Critique of Porter's Cost Leadership and Differentiation Strategies*, at 6 (2009 Oxford Bus. & Econ. Conference Program, June 22-24, 2009) (internal citations omitted), available at http://www.gcbe.us/2009_OBEC/data/Michael%20Porter,%20Y.%20Datta,%20Emeritus.doc ("In basic industrial commodities, such as pulp, paper, and steel knocking a couple of percentage points off production costs has far more strategic impact than all the weapons the marketer could employ in these industries.").

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between the competitors' and incumbent LECs' rates indicates that the market is not close to fully competitive and incumbent LECs are exercising their market power.

Second, forward-looking UNE rates are an appropriate measure for determining whether incumbent LEC Phase II rates are unreasonable because, as the FCC explained in its *CALLS Order* and *Access Charge Reform Order*, the incumbents' rates should be driven towards forward looking cost, either through competition or regulation.⁴² In fact, UNE rates are set *above* forward looking costs because the TELRIC formula permits incumbent LECs to earn a profit.⁴³ To the extent that Phase II rates are well above forward-looking UNE rates, the FCC must conclude that competition is not sufficient to meet the FCC's long-stated goal of moving rates towards costs. Equalizing Phase II and price cap rates would represent a step toward that goal.

4. A Decline In Average Incumbent LEC Prices Due To Increasing Utilization Of Volume/Term Agreements Does Not Represent A Decrease In Incumbent LEC Market Power

The incumbent LECs argue that the decline in their average revenue per DS1 and DS3 special access circuit in both Phase II and price cap areas demonstrates that they are not exercising market power in either Phase II or price cap areas.⁴⁴ But as PAETEC/XO, CompTel and TWTC have

⁴² See *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers et al.*, Sixth Report & Order in CC Docket Nos. 96-262 and 94-1 *et al.*, 15 FCC Rcd. 12962, ¶ 20 (2000) ("*CALLS Order*") ("In the *Access Charge Reform Order*, the Commission also stated that its primary method for bringing about cost-based access charges was by letting competition establish efficient rates....To the extent that competition did not fully achieve the goal of moving access rates toward costs, the Commission reserved the right to adjust rates in the future to bring them into line with forward-looking costs. To assist in that effort, the Commission said it would require price cap LECs to start forward-looking cost studies by no later than February 8, 2001 for all services then remaining under price caps."); *id.* ¶ 29 ("Price cap LECs will be able to choose between having these interim rate-level components apply for the full five years or having their rates reinitialized based on forward-looking economic cost."); *id.* ¶ 60 ("For those carriers that accept the *CALLS Proposal*, we are extending for five years the period during which we will allow the market-based approach to bring interstate access prices toward forward-looking economic cost.").

⁴³ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and CMRS Providers*, First Report and Order, 11 FCC Rcd. 15499, ¶ 245 (1996) ("In addition, the pricing standard we implement pursuant to section 252(d)(1)(B), which allows incumbent LECs to receive not only their costs but also a reasonable profit on the provision of unbundled elements, should further alleviate concerns regarding sham requests.").

⁴⁴ See, e.g., AT&T Comments, WC Dkt. No. 05-25, at 25 (filed Jan. 19, 2010); Verizon Comments at 6-8; see also *Verizon June 7 Letter* at 2 & n.4 (relying primarily on incumbent LEC filings regarding alleged price declines to support the proposition that "Verizon and others have provided extensive record evidence demonstrating that the existing regulatory regime is working to restrain prices for ILEC regulated special access services...").

repeatedly explained, a decline in prices over time, by itself, says nothing about whether that firm's price is set at supracompetitive levels. The monopoly price can rise or fall for many reasons, many of which have nothing to do with the level of competition. This is one reason why profit margins are the best measure of the incumbents LEC's market power.⁴⁵ Moreover, as the incumbent LECs themselves admit, much of the decline in their average revenue per circuit is attributable to an increased number of circuits under volume/term commitment plans.⁴⁶ As explained, a competitor's accession to onerous terms and conditions in exchange for lower prices is suggestive of the maintenance of incumbent LEC market power, not its diminution.

5. Intermodal Competition Is Not Sufficient To Prevent The Incumbent LEC Exercise Of Market Power

Finally, as PAETEC and XO again showed, services offered by intermodal competitors (HFC-based and fixed wireless services) are not a viable substitute for wireline special access service in the vast majority of instances.⁴⁷ While some customers no doubt have and will shift from special access to HFC-based and fixed wireless services, the evidence indicates that there is not a sufficient number of such customers to restrain the incumbents from charging supracompetitive special access rates.⁴⁸ Indeed, while the *existence* of intermodal competitors is not in doubt, there is no reason to believe that intermodal competitors will expand beyond the fringe in the foreseeable future.

The incumbent LECs rely primarily on evidence of the plans and limited entry of cable and fixed wireless companies into the special access market to support the assertion that intermodal competition is widespread. For example, to support its proposition that "the existing regulatory regime is working to...promote competition from new and emerging competitors," Verizon relies on incumbent LEC filings that, for the most part, cite to intermodal competitors' websites, marketing

⁴⁵ See *PAETEC/XO Letter* at 18-19; *TWTC July 9, 2009 Letter* at 8-10; Reply Comments of CompTel *et al.*, WC Dkt. No. 05-25, Reply Declaration of Joseph Farrell on Behalf of CompTel, ¶¶ 41- 44 (filed July 29, 2005).

⁴⁶ See *Lew/Recine Decl.* ¶ 9 ("The substantial discounts provided under Verizon's generally available discount plans are a major driving force behind the significant declines in the real prices customers paid Verizon for special access services between 2002 and 2008.").

⁴⁷ See *PAETEC/XO Letter* at 22-30.

⁴⁸ See *id.*; see also Nat Worden, *AT&T Wireless Plan May Lift Cable*, Wall St. J., June 7, 2010 ("[AT&T plan to cap wireless data usage] is the final nail in the coffin for any suggestion that wireless networks could replace wireline. The wireless networks simply aren't built for streaming video, and AT&T has made that clear with its new pricing plan.") (quoting Sanford C. Bernstein analyst Craig Moffett), available at http://online.wsj.com/article/SB10001424052748704726104575290724208352274.html?mod=WSJ_hpp_sections_tech.

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materials and companies' stated intentions of entering the business market, not evidence of actual competition or competitive deployment beyond the competitive fringe.⁴⁹

Verizon and other incumbent LECs do describe cable companies' revenue from serving businesses. But there is no way to know what percentage of that revenue is generated from services that serve as substitutes for special access services. The available evidence indicates that this percentage is likely to be very small. For example, Verizon again repeats its assertion that Cox earned nearly \$1 billion in "commercial services revenues" in 2009 and would surpass \$1 billion in 2010.⁵⁰ As explained by PAETEC and XO, cable companies primarily serve very small business customers that do not demand the sophisticated features offered by DS-n and Ethernet special access services and that are satisfied with asymmetrical, best-effort, HFC-based services.⁵¹ Indeed, the head of Cox's business services unit recently explained that 80 percent of its customers are "very small businesses" with "19 or fewer employees."⁵² Therefore, the vast majority of Cox's business services revenue is likely not generated from services that are substitutes for special access service. Similarly, while Time Warner Cable's "business services revenue" may have "increased by almost half to \$263 million" in the first quarter of 2010,⁵³ Time Warner Cable recently stated that its "sweet spot is the small businesses, actually very small businesses..."⁵⁴ Even Comcast, the largest cable company in the country, only earned \$216 million in the third quarter of 2009 from its business services unit which has been targeting businesses with only 1-20 employees.⁵⁵ Moreover, a substantial portion of cable

⁴⁹ See *Verizon June 7 Letter* at 2, n.4 (citing *Verizon Comments* at 20-28, *USTelecom Reply Comments* at 5-14 and *USTelecom "Fact Report"* at 8-34); see also *id.* at 3 ("Cox has indicated that it is prepared to offer backhaul services...Other cable companies have indicated similar capacity and plans.") (emphasis added); *id.* at n.21 (noting that Fibertower is providing backhaul to Verizon Wireless in "portions of Ohio and Michigan" and to MetroPCS in "select markets.").

⁵⁰ *Verizon June 7 Letter* at 6; *Verizon Comments* at 22.

⁵¹ See *PAETEC/XO Letter* at 25-26.

⁵² Jeff Baumgartner, *Cox's Phil Meeks: On the road to \$1B*, *Light Reading*, Dec. 3, 2009, available at http://www.lightreading.com/video.asp?doc_id=185410&print=yes.

⁵³ *Verizon June 7 Letter* at 6.

⁵⁴ Time Warner Cable, Inc., Q4 2009 Earnings Call Transcript (Jan. 28, 2010), available at <http://seekingalpha.com/article/185162-time-warner-cable-inc-q4-2009-earnings-call-transcript>.

⁵⁵ See, e.g., *Big Cable Operators Expect Large Commercial Service Revenue Gains*, *Comm. Daily*, Jan. 5, 2010; Sean Buckley, *Comcast Wraps Acquisition of Cimco*, *Fierce Telecom*, Mar. 18, 2010, available at <http://www.fiercetelecom.com/story/comcast-wraps-acquisition-cimco/2010-03-18>.

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companies' business services revenue may well be derived from video services provided over HFC-networks, not data transmission services.⁵⁶

The FCC's most recent orders rejecting Verizon's and Qwest's unbundling forbearance petitions underscore the reality that cable companies are simply not competing in the business market in a meaningful way.⁵⁷ The 10 MSAs subject to Verizon's and Qwest's petitions were selected by the *incumbents* as the markets most likely to have the highest levels of competition. The FCC's determination that there is little competition in the provision of DS1 or DS3 services in general, and from intermodal competitors in particular in those markets is a strong indication that there is no such competition in any geographic market.

To the extent that cable companies do provide fiber-based special access services, they can only do so at a very limited number of locations. This is because cable companies, like "traditional

⁵⁶ See Cox Communications Inc., *Cox Business Video* (last visited June 14, 2010), at <http://www.coxbusiness.com/products/video/commercialcable.html> ("Cox Business Video service provides consistent, crystal clear digital cable television for businesses of all types and sizes. Whether you're a bar or restaurant that wants to give your customers the widest possible range of sports coverage, a business that wants to provide television viewing in employee lunchrooms and break rooms, a financial center that needs the latest important business and financial updates, or a business that is just looking to keep your employees and customers informed of local, national and international news, Cox Business Video will be a valuable tool for your business.").

⁵⁷ *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC Rcd 21293, n.116 (2007) ("Most of the cable operators state that their networks are primarily in residential areas and their provision of services to enterprise customers are still in the initial stages. For example, Comcast states that its cable networks are primarily in residential areas and to the extent small businesses are in the areas, Comcast does make its services, including voice, to those entities in the Boston, Pittsburgh and Philadelphia MSAs....Comcast further states that commercial phone has not been a focus until 2006 and it has not, to date, made any significant or sustained entry into the business market and enterprise markets....Both Charter and Verizon recognize that Charter's network only passes in largely residential areas....While Time Warner Cable indicates that it has built out facilities enabling the provision of voice service to most households in the portions of the New York MSA in which it operates, Time Warner Cable explains that it is unable to reach most enterprise customers using its own last-mile facilities.") (internal citations omitted); *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, Memorandum Opinion and Order, 23 FCC Rcd 11729, ¶ 16 (2008) ("We also find that, in these four MSAs, Qwest is subject to intermodal competition, particularly from cable operators, primarily for residential services."). *id.* at n.137 ("But we are unable to determine on this record that Cox is a significant provider of wholesale enterprise services in this MSA.").

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CLECs,” can only overcome the barriers to deploying fiber loop facilities in a limited number of circumstances.⁵⁸

The evidence of fixed wireless competition presented by Verizon only reinforces the conclusion that fixed wireless service is not a viable substitute for special access in most cases. For example, Verizon argues that fixed wireless provider Clearwire “has indicated that it can provide backhaul services to wireless providers and it even intends to offer those services to its majority owner Sprint at discounted rates.”⁵⁹ But even if Clearwire sells *some* backhaul services to Sprint, Sprint recently stated that “[e]ven Clearwire...is expected to build wireless links to only 10% of Sprint’s cell sites over the next several years.”⁶⁰ Additionally, while Verizon focuses on intermodal backhaul competition from Fibertower,⁶¹ Fibertower’s first quarter 2010 revenues were less than \$20 million. This is a tiny fraction of the billions of dollars that Verizon alone earns each year from special access.⁶²

The incumbents’ own backhaul plans underscore the substantial gap between incumbents’ assertions of robust intermodal competition and the reality that intermodal competitors, are, at best, bit players in the backhaul market. As PAETEC/XO argued, and Verizon reiterates, Verizon is primarily relying on its own fiber networks, not the networks of other wireless carriers or intermodal competitors, to provide backhaul to itself as well as to other wireless carriers.⁶³

⁵⁸ See *PAETEC/XO Letter* at 26-27.

⁵⁹ See *Verizon June 7 Letter* at 4.

⁶⁰ Letter of Charles W. McKee, VP-Regulatory Affairs, Fed. and State Regulatory, Sprint, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 4 (May 6, 2010).

⁶¹ See *Verizon June 7 Letter* at 2, n.5, 4, n.15, 5, nn.19-22.

⁶² Fibertower Form 10-K at 4 (Mar. 31, 2010) *available at* <http://www.fibertower.com/corp/downloads/investors/quarterly10Q/10Q-Q12010.pdf>.

⁶³ See *Verizon June 7 Letter* at 3 (“To satisfy [increasing backhaul] demand, Verizon alone has made substantial investments to deploy fiber to cell sites for several different carriers. As a result of these investments, Verizon has already deployed fiber to about three thousand cell sites and is on track to deploy fiber to several times this number of cell sites by the end of this year.”); *PAETEC/XO Letter* at 28 (noting that “Verizon recently announced that it is planning to deploy its own fiber to ‘90% of the cell sites in its territory within the next 5 years.’ As Verizon’s CTO, Tony Melone, explained, ‘[i]f fiber is available, it’s the better alternative.’”) (citing Phil Goldstein, *Verizon’s Melone Details 4G Plans for Backhaul, Antennas and Backup Power*, *Fierce Wireless*, Sept. 22, 2009, *available at* <http://www.fiercewireless.com/story/verizons-melone-stresses-collaboration-4g/2009-09-22>).

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III. Equalization of Price Cap and Price Flex Rates Must Be Only The First Step In Reforming The Special Access Regime

As PAETEC/XO and CompTel argue, equalization of Phase II and price cap rates is only an initial step in reforming the special access regulatory regime. The FCC must undertake additional analysis, and, if necessary, additional data collection in order to complete comprehensive special access reform.⁶⁴

First, the FCC must design and establish a new framework to determine the geographic and product markets in which competition is sufficient to constrain the incumbent LECs' price and non-price conduct. This framework would replace the current pricing flexibility regime. TWTC and BT have suggested adopting the approach taken by OfCom, which, as PAETEC/XO note, "examine[s] actual and potential deployment on a zip code or postal code basis."⁶⁵ Sprint has suggested using the *TRRO* triggers as a starting point for market analysis.⁶⁶ Any analytical approach will likely involve the collection of additional data. For example, the TWTC/BT approach will require the submission of data regarding competitors' local fiber transport networks. TWTC fully supports whatever data collection the FCC believes is necessary to undertake the analytical framework chosen.⁶⁷ It is critical, however, that the Commission initiate that process as soon as possible.

Second, the FCC should reverse its decision to eliminate dominant carrier regulation over packet-switched services, particularly Ethernet, and ensure that competitors can obtain access to reasonably priced Ethernet special access services at wholesale. As PAETEC/XO explain, "given incumbent LECs' market power over the facilities necessary to provide all special access services (both TDM and packet-switched), there was no logical reason to exclude all Ethernet services from [price cap] regulation."⁶⁸ Indeed, as TWTC has explained, the incumbent LECs have used their pricing freedom to set Ethernet rates at supracompetitive levels.⁶⁹ Furthermore, as TWTC and others have repeatedly explained, copper and TDM-based inputs cannot be used to provide finished Ethernet

⁶⁴ See PAETEC/XO Letter at 30-31.

⁶⁵ *Id.* at 30; see also TWTC Comments, WC Dkt. No. 05-25, at 26-31 (filed Jan. 19, 2010); BT Americas Comments, WC Dkt. No. 05-25, at 24-33 (filed Jan. 19, 2010).

⁶⁶ See Sprint Comments, WC Dkt. No. 05-25, at 10-14 (filed Jan. 19, 2010).

⁶⁷ TWTC was a signatory to a letter filed exactly one year ago which outlined a proposed data collection framework. See Letter of Don Shephard, Vice President, Federal Regulatory Affairs, tw telecom inc., *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25 (filed June 3, 2009).

⁶⁸ PAETEC/XO Letter at 30.

⁶⁹ See, e.g., Letter of Thomas Jones, Counsel, TWTC, to Marlene H. Dortch, Secretary, FCC, GN Dkt. Nos. 09-51 *et al.* (Dec. 22, 2009).

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service in most cases because of copper's distance and capacity limitations as well as the costs and engineering problems associated with using TDM-based inputs.⁷⁰

As a result of TWTC's inability to rely on off-net facilities to provide Ethernet, **[confidential begin] [confidential end]**. Until the FCC ensures that incumbent LEC prices for Ethernet services are set at just and reasonable levels, the addressable market of TWTC and other providers of Ethernet service will be artificially constrained and competition will be artificially limited. The FCC must therefore act swiftly to reverse its grants of forbearance eliminating dominant carrier regulation over incumbent LEC packet-switched special access services, including Ethernet.

Third, the FCC must address what are clearly unreasonably high price cap rates. As numerous commenters have explained and as CompTel has again reiterated, incumbent LEC prices for special access services subject to price cap regulation are well above both competitors' rates and the incumbent LECs' own forward looking costs.⁷¹ The FCC must therefore design a mechanism to move incumbent LEC price cap prices towards reasonable levels.

Fourth, the FCC should, as PAETEC/XO urge, "closely examine and, if necessary, prohibit anticompetitive terms and conditions in incumbent LEC volume/term and contract tariff discount offers." However, as PAETEC/XO explain, if incumbent LEC non-discounted rates (e.g., 1-3 year term rates) are set at reasonable levels, "the FCC need not concern itself with the terms of such tariffs."⁷²


⁷⁰ See, e.g., Letter of Thomas Jones, Counsel, tw telecom, to Marlene H. Dortch, Secretary, FCC, GN Dkt. Nos. 09-51 *et al.*, at 9-10 (Dec. 22, 2009); Letter from Joshua M. Bobeck, Counsel, Alpheus Communications, L.P., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-125, at 3-5 (Oct. 9, 2007); *Ex Parte* Letter from Aryeh Friedman, BT Americas Inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 06-125 & 06-147, at 1-2 (Oct. 5, 2007); *Ex Parte* Letter from Brad E. Mutschelknaus *et al.*, Counsel, NuVox Communications *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 04-440 *et al.*, at 7 (Sept. 19, 2007); *Ex Parte* Letter from Laura H. Carter, Vice President, Government Affairs, Fed. Regulatory, Sprint Nextel, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 06-125 *et al.*, at 7-8 (Aug. 30, 2007); Opposition of Time Warner Telecom, Inc. *et al.*, WC Dkt. Nos., 06-125 & 06-147, at 16-20 (Aug. 17, 2006).

⁷¹ See *CompTel Letter* at attachments A and B; PAETEC *et al.* Reply Comments at 63 (The BOCs' special access rates "significantly exceed the rates Competitive Access Providers...offer for similar services."); PAETEC *et al.* Comments at 68, (citing Sprint/Nextel Comments, WC Dkt. No. 05-25, Decl. of Bridger Mitchell ¶ 57 & Exh. 3 (filed Aug. 8, 2007)) (noting that, in 2007, Sprint found that, in five states (WI, TX, OR, MI, CA), AT&T's price cap rates for DS1 circuits were from 53% to 248% greater than AT&T's comparable UNE rates. In four states (PA, NY, MA, MD), Verizon's price cap rates for DS1 circuits were 24% to 126% greater than comparable UNE rates. For DS3 circuits in those same states, AT&T's price cap rates exceeded UNE rates by 165%, and Verizon's by 4-59%).

⁷² PAETEC/XO Letter at n.112.

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Respectfully submitted,



Thomas Jones
Jonathan Lechter

Attorneys for tw telecom inc.

REDACTED-FOR PUBLIC INSPECTION

APPENDIX A



Accessible

AT&T 13-STATE - Announces the Expiration of a Temporary Rate Reduction in Phase II Areas

Date: June 1, 2010

Number: **ACCESS10-025**

Category: Special Access

Issuing ILECS: AT&T Illinois, AT&T Indiana, AT&T Ohio, AT&T Michigan, AT&T Wisconsin, AT&T California, AT&T Nevada, AT&T Arkansas, AT&T Kansas, AT&T Missouri, AT&T Oklahoma, AT&T Texas and AT&T Connecticut (collectively referred to for purposes of this Accessible Letter as "AT&T 13-State")

Contact: Account Manager

Effective July 1, 2010, certain temporary rate reductions on interstate special access DS1 and DS3 local distribution channels and mileage services will expire. These temporary rate reductions were announced through Accessible Letters dated March 29, 2007, as listed in the table below.

The temporary rate reductions described in this accessible letter apply to DS1 and DS3 services provided in Phase II Pricing Flexibility MSAs, as described in AT&T's Interstate special access tariffs. Upon expiration of the temporary rate reductions, customers subscribing to the affected services, including customers that subscribed to or renewed term plans while the temporary rate reductions were in effect, will no longer be billed at the temporarily reduced rates. Upon the expiration of the temporary rate reductions, Customers will pay the rates set forth in the tariff sections identified in the table below.

AT&T Region	Tariff Reference	2007 Accessible Letter Number
Ameritech	FCC #2 Section 21.5.2.7.1	ACCESS07-028
Nevada Bell	FCC #1 Section 22.5.2.6.1	ACCESS07-026
Pacific Bell	FCC #1 Section 31.5.2.7.1	ACCESS07-026
SNET	FCC #39 Section 24.5.2.6.1	ACCESS07-027
Southwestern Bell	FCC #73 Section 39.5.2.7.1	ACCESS07-029

REDACTED-FOR PUBLIC INSPECTION

If you have questions related to the expiration of the temporary rate reductions, please contact your AT&T Account Manager.

AT&T 13-State reserves the right to modify or to cancel the above information prior to the proposed effective dates. Should AT&T do so, such modification or cancellation will be reflected in a subsequent accessible letter. AT&T will incur no liability to the customer as a result of such modification or cancellation.



Accessible

Date: **June 1, 2010**

Number: **CLECSE10-079**

Effective Date: **July 1, 2010**

Category: **SPECIAL ACCESS**

Subject: **AT&T SOUTHEAST REGION – Announces the Expiration of a Temporary Rate Reduction in Phase II Areas**

Related Letters: **Carrier Notification SN91087050** Attachment: **NA**

States Impacted: **Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee**

Issuing ILECS: **AT&T Alabama, AT&T Florida, AT&T Georgia, AT&T Kentucky, AT&T Louisiana, AT&T Mississippi, AT&T North Carolina, AT&T South Carolina and AT&T Tennessee (collectively referred to for purposes of this Accessible Letter as "AT&T Southeast Region")**

Response Deadline: **NA**

Contact: **Account Manager**

Conference Call/Meeting: **NA**

Effective July 1, 2010, certain temporary rate reductions on Interstate special access DS1 and DS3 local distribution channels and mileage services will expire. These temporary rate reductions were announced through Carrier Notification SN1087050, dated March 29, 2007.

The temporary rate reductions described in this accessible letter apply to DS1 and DS3 services provided in Phase II Pricing Flexibility MSAs, as described in AT&T's Interstate special access tariffs. Upon expiration of the temporary rate reductions, customers subscribing to the affected services, including customers that subscribed to or renewed term plans while the temporary rate reductions were in effect, will no longer be billed at the temporarily reduced rates. Upon the expiration of the temporary rate reductions, Customers will pay the rates set forth in BellSouth Telecommunications, Inc. Tariff No. 1 Section 23.5.2.9.1, for these services.

If you have questions related to the expiration of the temporary rate reductions, please contact your AT&T Account Manager.

AT&T Southeast Region reserves the right to modify or to cancel the above information prior to the proposed effective dates. Should AT&T Southeast Region do so, such modification or cancellation will be reflected in a subsequent accessible letter. AT&T Southeast Region will incur no liability to the customer as a result of such modification or cancellation.